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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

| | | |
|-------------------|---|---------------------------|
| STATE OF ARIZONA, |) | No. CR201800855 |
| |) | |
| Plaintiff, |) | MOTION TO MODIFY |
| |) | CONDITIONS OF RELEASE |
| vs. |) | |
| |) | (ORAL ARGUMENT REQUESTED) |
| TRACY OSKERSON, |) | |
| |) | (Hon. John F. Kelliher) |
| Defendant. |) | |

NOW COMES the Defendant, TRACY OSKERSON, by and through undersigned counsel, and hereby moves, pursuant to Ariz.Const. Art. II § 22, A.R.S. § 13-3967, and Ariz.R.Crim.P. 7.1 - 7.5 for an order modifying the conditions of release to permit the Defendant's release on defendant's own recognizance, or alternatively, to the third-party custody of her fiancé, Macario Mora, Sr., or, for a reduction in the amount of bond, as is more fully set forth in the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 27th day of September, 2018.

MARK A. SUAGEE
COCHISE COUNTY PUBLIC DEFENDER

By 
Mathew B. Cannon
Deputy Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURE FOR MODIFICATION OF RELEASE CONDITIONS

Ariz. R. Crim. P. 7.4(b) states that "[o]n motion or on its own, a court may reexamine the conditions of release if the case is transferred to a different court or a motion alleges the existence of material facts not previously presented to the court." In this case, the following constitute cause for a reexamination of the conditions of release:

1. The matter has been transferred to the Superior Court; and
2. Tracy Oskerson is now represented by counsel, who can put forth facts in support of his release. She was not represented by counsel at her Initial Appearance.

II. CHARGES

Ms. Oskerson is charged with two counts of aggravated assault, class 3 felonies; and one count of attempted second degree murder, a class 2 felony.

III. LAW AND ARGUMENT

"A defendant charged with a crime but not yet convicted is presumed to be innocent." Ariz.R.Crim.P. 7.2(a)(1) "[A]ny defendant charged with an offense bailable as a matter of right must be released pending and during trial on the defendant's own recognizance with only the mandatory conditions of release required under Rule 7.3(a)." Ariz.R.Crim.P 7.2(a)(2) Only when the court determines that such a release will not 1) reasonable assure the defendant's appearance, or 2) protect the victim, any other person, or the community from risk of harm by the defendant, can additional conditions be imposed. Ariz.R.Crim.P 7.2(a)(2) Ariz. Const. Art. II, § 22(b). "If the court makes such a determination, it must impose the least onerous conditions of release set forth in Rule 7.3." Ariz.R.Crim.P 7.2(a)(2) However, the court must remember that bail is constitutionally excessive when it is more than is necessary to ensure the accused's presence at future court appearances. Moreover, "[a] court may not set bail in an amount calculated to merely

keep a defendant in jail or as a form of punishment.” *Gusick v. Boies*, 72 Ariz. 233, 236-38, 233 P.2d 446, 448-49 (1951).

Ariz. R. Crim. P. 7.3(c) provides a list of conditions that may be imposed to ensure a person’s attendance at future court hearings. Rule 7.3(c)(1) provides a list of non-monetary conditions that may be imposed 1) if the court determines the mandatory conditions under 7.3(a) are insufficient and, 2) if the court finds the condition is reasonable and necessary to secure the defendant’s appearance or to protect another person or the community from risk of harm by the defendant. In making the finding articulated above, the court **MUST** consider the results of a risk assessment approved by the Supreme Court and, if provided, a law enforcement agency’s lethality assessment. Ariz.R.Crim.P 7.3(c). Rule 7.3(c)(2) provides the process for imposing monetary conditions if the court first determines the mandatory conditions and non-monetary conditions are insufficient. The rule states generally that “[a] court’s imposition of a monetary condition of release must be based on an individualized determination of the defendant’s risk of non-appearance, risk of harm to others or the community, and the defendant’s financial circumstances.” Ariz.R.Crim.P. 7.3(c)(2)(A). A.R.S. § 13-3967 provides a non-exhaustive list of items that the Court should consider when imposing release conditions. In the situation at hand, nearly every one of the statutory considerations weigh in favor of Ms. Oskerson:

1. Views of the [alleged] victim.

The views of the alleged victim are unknown to the defense at this time.

2. Nature and circumstances of the offense.¹

The State’s allegations, based on the complaint filed and the probable cause statement, are that on September 13, 2018, Ms. Oskerson pointed a handgun at the alleged victim and fired that handgun toward the head of the alleged victim.

¹ The facts and allegations described in this section are offered to summarize the State’s allegations against Ms. Oskerson. Nothing in this memorandum constitutes an admission, concession, or stipulation.

3. **Whether the accused has a prior arrest or conviction for a serious offense or violent aggravated felony.**

Ms. Oskerson has no record of any conviction or arrested prior to this alleged offense. This factor clearly weighs in favor of the defendant and for her release.

4. **Evidence that the accused poses a danger to others in the community.**

Ms. Oskerson poses no danger to others or her community. She has been a law abiding citizen her entire life. She has no prior record of conviction or arrest at all. This factor clearly weighs in favor of the defendant and for her release.

5. **Results of a risk or lethality assessment in a domestic violence charge that is presented to the court.**

This consideration is not applicable for this case.

6. **Weight of evidence against the accused.**

The weight of the evidence in this case rests almost entirely with the false allegation that has been made against her by this alleged victim. The alleged victim had been stalking Ms. Oskerson, had written her a strange letter urging her to leave her fiancé and come to live with him. When she rejected the alleged victim's advancements, he made false allegations about her sleeping with him to her fiancé. Finally, when her fiancé told him to get off their property, this alleged victim has exaggerated a verbal argument into an aggravated assault involving the discharge of a gun. When law enforcement arrested Ms. Oskerson, she did not have a gun on her person, did not have a gun in her vehicle, and a search of her residence resulted in the seizure of only an antique style 22 caliber flintlock pistol that has never been fired since she purchased it a few months prior to this alleged offense. The search did not uncover gun powder, ball shots, wadding, caps or flints. A search of the alleged crime scene did not uncover a shell casing. The only corroborating evidence is the testimony of the neighbor who originally called the police. He was, by his own account, ½ mile away from where he heard yelling but could miraculously make out clearly the words spoken by a female. The weight of the evidence here is incredibly weak and this factor clearly weighs in favor of the defendant and for her release.

7. **Accused's family ties, employment, financial resources, character and mental condition.**

Ms. Oskerson owns property here in Cochise County. She plans to reside on that property with her fiancé, Macario Mora, Sr. She also has family in the Phoenix area. If the defendant is released she would return to live with her fiancé at 12491

S. Oskerson Ave., Pearce, AZ 85625. This factor clearly weighs in favor of the defendant and for her release.

8. Results of any drug test submitted to the court.

There has been no allegation that Ms. Oskerson was under the influence of drugs or alcohol during the alleged offense. This factor clearly weighs in favor of the defendant and for her release.

9. Whether the accused is using an illegal substance.

There has been no allegation that Ms. Oskerson was using an illegal substance. This factor clearly weighs in favor of the defendant and for her release.

10. Whether the offense involved methamphetamine.

The offenses did not involve the possession of methamphetamine. This factor clearly weighs in favor of the defendant and for her release.

11. Length of time in community.

Ms. Oskerson grew up in Arizona. She left to pursue a military career and follow her first husband wherever he was stationed while serving in the military. She moved back after her divorce and lived in the Phoenix area for 4 years and the last nearly 2 years here in Cochise County. This factor clearly weighs in favor of the defendant and for her release.

12. Accused's record of arrests and convictions.

Ms. Oskerson has no prior record of arrests or convictions. This factor clearly weighs in favor of the defendant and for her release.

13. Accused's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

Ms. Oskerson has no record of failing to appear for court proceedings. This factor clearly weighs in favor of the defendant and for her release.

14. Whether the accused has entered or remained illegally in the united states.

Ms. Oskerson is a US citizen. This factor clearly weighs in favor of the defendant and for her release.

15. Whether the accused's residence is in the state, another state, or outside of the United States.

Ms. Oskerson resides in Arizona. This factor clearly weighs in favor of the defendant and for her release.

As shown above, at least 13 of the 15 considerations weigh in favor of the defendant and for her release pending the disposition of this case. Additionally, Ariz.R.Crim.P. 7.3 contains a list of conditions that the court may apply, to ensure the accused's presence at future proceedings. The court is to apply the "least onerous" of the conditions. In the situation at hand, the current condition of a \$250,000 secured bond, is not the least onerous release condition at the court's disposal.

IV. CONCLUSION

Ms. Oskerson respectfully requests that this honorable court modify the existing conditions on her release, and release her on her own recognizance, or alternatively, to the third-party custody of her fiancé, Macario Mora, Sr., or, for a reduction in the amount of bond. This appears to be a reasonable condition on her release, given the considerations listed above that weigh in favor of her not being a flight risk or a danger to the community.

RESPECTFULLY SUBMITTED this 27th day of September, 2018.

MARK A. SUAGEE
COCHISE COUNTY PUBLIC DEFENDER

By 

Mathew B. Cannon
Deputy Public Defender

Copy of the foregoing delivered this
27th day of September, 2018 to:

Hon. John F. Kelliher
Judge of the Superior Court
Bisbee, AZ 85603
via inter-office mail

Deputy County Attorney
Bisbee, AZ 85603
via inter-office mail

By: E. U. Oo